No. 893

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

HELEN VAN ZILE ANTHONY and WILLIAM D. SMITH,
Petitioners.

against

UNITED STATES TRUST COMPANY OF NEW YORK,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI.

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April 25, 1944.

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Opinion of trial court (New York Supreme Court) is not officially reported; it is printed at pages 20-30 of the record. Judgment affirmed by Appellate Division of the Supreme Court without opinion, 266 App. Div. 951. Appeal dismissed without opinion by New York Court of Appeals, 292 N. Y. (Mem.) 513, 514.

(Petitioners have presented on this application the printed record on appeal from the decree of the Surrogate's Court in *Matter of James.* Where parenthetical citation figures are used in this brief, those referring to the Surrogate's Court record are preceded by the letter "S" and indicate page numbers in that record; citations not so designated refer to page numbers of the record in the case at bar).

Foreword

The clearest and most comprehensive judicial statement of all the matters in any way involved in this litigation is found in the decision of Mr. Justice Walter (20-30) on which

the judgment was entered. It needs but the reading of this decision to reveal how utterly fantastic is any claim of denial of constitutional rights, or of any error in the adjudication either in the present action or in the previous proceeding in the Surrogate's Court.

The judgment rendered thereon was unanimously affirmed without opinion by the Appellate Division of the New York Supreme Court (266 App. Div. 951). Petitioners appealed to the New York Court of Appeals, appealing as of right on the claim that a constitutional question was involved (petitioners' brief, p. 11). Petitioners moved in that court for a certificate that a constitutional question was involved, which motion was denied (344-5) and by subsequent order of that court the appeal was dismissed (341). When an appeal taken as of right has been dismissed by the Court of Appeals the New York statute gives the appellant the right to apply nevertheless for permission to appeal (Civil Practice Act, Sec. 592) and if the application be granted the appeal is heard in regular course. No such application was made in the present case.

I

Petitioners have made this application for certiorari without attempting to comply with the indispensable condition that final judgment should have been rendered by the highest state court having jurisdiction to render such judgment or that petitioners should have exhausted their available remedies to obtain such final judgment.

Certiorari is not available until a litigant has done all that can be done in the state courts to avert an unfavorable judgment. He may not split up his contentions and go to the Supreme Court on an alleged constitutional claim until the state courts are through with the case. Obviously a final judgment in his favor on the merits in the state court would make certiorari unnecessary. If, and only if, on such final

judgment the decision is against him the law permits him to ask for a review by certiorari of an alleged denial by the court below of his constitutional rights.

The language of the jurisdictional statute (Judicial Code, Sec. 237, subd. b; U. S. C., Ann., Sec. 344, subd. b) is that certiorari may be granted to review

> "any cause wherein a final judgment or decree has been rendered or passed by the highest Court of a State in which a decision could be had . . . where any . . . right . . . is specially set up or claimed . . . under the constitution."

In the present case no final judgment has been rendered by the highest state court in which a decision could be had.

Petitioners feel aggrieved by the judgment rendered against them at *nisi prius*, by its affirmance by the intermediate appellate court, the Appellate Division of the Supreme Court, the refusal by the court of last resort to certify that a constitutional question is involved and its dismissal of the appeal at that point. As for proceeding on the way to final judgment, that is as far as the petitioners had gone when they sued out their petition for certiorari.

But when the Court of Appeals rendered the decision now sought to be reviewed there still remained open to petitioners the possibility of review by appeal on the merits. The highest court of New York is the Court of Appeals, vested with jurisdiction to review the judgment of the trial court and of the intermediate appellate court. Under the law of New York, that jurisdiction is two-fold; it exists

> 1. As of right (along with other situations not relevant here) where "there be directly involved the construction of the constitution of the state or of the United States" (New York Civil Practice Act, Sec. 588, subd. 1(a); and
>
> 2. By permission of the Appellate Division or of the Court of Appeals, "from a judgment . . . of the Appellate Division . . . which is not appealable

of right only because it does not comply with'' Sec. 588, subd. 1(a), quoted immediately above or with certain other categories similarly permitting appeals as of right (Ib., Sec. 589, subd. 2).

Therefore in order to reach the final judgment rendered by the highest court of the state in which a decision could be had petitioners had two roads open. They might first, if they deemed a constitutional question involved, take their appeal as of right. This they did. The New York statute permits an appellant thus appealing without security to apply to the Court of Appeals for a certificate that a constitutional question is involved and thus to establish by formal pronouncement of the court their standing to appeal as a matter of right. Such an application was made by petitioners, and on its consideration the court decided that no constitutional question was involved and denied the requested certificate (344-5).

This did not advance the case to the stage of final judgment. There still remained open to petitioners the remedy of seeking review of the judgment below by obtaining either from the intermediate court or from the highest court permission to appeal to the Court of Appeals. The New York statute has most carefully preserved to litigants the right first to test the possibilities of appeal as of right without thereby losing the right to seek permission to appeal even if the court holds that there is no appeal as of right. The law expressly provides that the right to apply for permission to appeal survives the dismissal of an appeal taken as of right. Civil Practice Act, Sec. 592, subd. 5(b) provides that throughout the current term at which the appeal mistakenly taken as of right was dismissed or during the next succeeding term application may be made for permission to appeal. Two remedies are thus available to seek review of the judgment by the court of last resort and these remedies are cumulative and not alternative; one by appeal as of right and the other by seeking permission to

appeal.* Until both remedies have been exhausted there has been no final judgment rendered by the highest court of the state in which a decision could be had. Of course if application for permission to appeal had been made and refused, this would have left the record with a final judgment of the highest court in which a decision could be had, but nothing of the sort having been even attempted, the door is not open to certiorari.

This has been so explicitly and repeatedly pointed out by this court that the petition in this case seems inexcusable.

> "It was the purpose of the Judiciary Act of February 13, 1925, as well as that of all its predecessors, that no decision of a state court should be brought here for review either by appeal or certiorari until the possibilities afforded by state procedure for its review by all state tribunals have been exhausted."
>
> Gorman *v.* Washington University, 316 U. S. 98, 100-1;
> Stratton *v.* Stratton, 239 U. S. 55;
> Mullen *v.* Western Union Beet Co., 173 U. S. 116;
> Fisher *v.* Perkins, 122 U. S. 522.

The practical wisdom of this principle is strikingly exemplified here. As the court will see on examination of petitioners' so-called constitutional question, it presents no constitutional question whatever. If petitioners were right in their contention the highest state court could and doubtless would have granted permission to appeal and given them judgment on the law, with no necessity of invoking the constitution. As this court has repeatedly said, it is not to be presumed that a state court would deny permission to appeal in a case where the importance of the principles involved warrant it.

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* Permission to appeal is apparently the most prolific single source of jurisdiction in the Court of Appeals of New York. Examination of the most recent official volume of its decisions (290 New York) shows that out of 231 appeals determined, 81, or more than a third of the whole, were brought up by permission to appeal.

Tunny v. *Ohio*, 273 U. S. 510, 515; *Chesapeake & Ohio Ry. Co.* v. *Mihas*, 280 U. S. 102, 104; and *Minneapolis St. P. & S. S. M. Ry. Co.* v. *Rock*, 279 U. S. 410, cited at end of p. 12 of petitions' brief, are not in point. In none of them was there a statute like the New York Civil Practice Act authorizing appeal on the merits by permission of the court after its dismissal of an appeal mistakenly taken as of right on constitutional grounds. On such an appeal by permission the aggrieved party may succeed in obtaining judgment on the law and facts apart from his constitutional claim, in which case there will be no constitutional question for the Supreme Court to determine. The Supreme Court will not take certiorari on the chance of a constitutional question being ultimately involved, but will withhold consideration of the alleged constitutional question until the final judgment of the state court.

II

No constitutional question is presented

The constitutional right of which petitioners claim to have been deprived by the judgment below is the right to due process of law. Yet the record shows an interlocutory and a final judgment, both rendered in due course, by a court of general jurisdiction, (31-2, 49-53) founded on a complaint (5-10) issue joined by answer (11-19) and a two-days actively contested trial (54-130); things not ordinarily consistent with want of due process of law. It appears, however, that petitioners' real attack is not on the judgment sought to be reviewed, but on a decree rendered in 1940 in another proceeding in another court. Nearly the whole of their long brief is devoted to criticism, not of the judgment in this action but of a decree in another proceeding wherein certiorari was sought and denied by this court two years ago (*Anthony* v. *U. S. Trust Company*, 315 U. S. 822). That was a decree of the New York Surrogate's Court, New York County, part of a similar normal court record, including

petition (S 15-23), appearance and answer (S 71-77), trial in court (S 80-132) and affirmance on appeal (262 App. Div. 703) through the highest court of the state (287 N. Y. 645) and denial by this court of certiorari (315 U. S. 822).

Petitioners, again reiterating in almost identical language that the decree of the Surrogate's Court rendered in 1940 was in some way subject to attack, now declare the present judgment of the Supreme Court "void" because they consider it "based on" or "founded on" the decree of the Surrogate's Court in anothr proceeding; a contention utterly groundless, because the present judgment would have been precisely what it is if the former decree were not in existence.

The petition and brief run to forty pages, yet we fear that even after their prolix presentation this court will have some difficulty in finding what this case is all about. What really happened is as follows:

Helen V. Z. Anthony, one of the petitioners, was remainderman under a testamentary trust which fell in on October 13, 1935 (20). Some months afterwards, the trustee (respondent on this application) presented to her its account of its proceedings (5, 6) with a requested instrument of accounting and release, and after keeping it for five or six months, during which period she employed counsel, she executed and delivered a release accepting and approving the account (20). Some two years and a half thereafter, another of the petitioners, one William D. Smith, began an action against the trustee (*ib.*), alleging that in regard to one particular asset of the trust estate—a mortgage participation which because of its fractional nature could not be completely disposed of until the liquidation of the entire mortgage—the trustee, it was alleged, had *converted* it (21), and in his complaint he went into the whole history of the investment both before and after the release (S 223-231). The alleged "conversion" consisted in a reduction of the mortgage interest rate, made after the release, the participation being one of $10,000 in a $110,000 mortgage (S 229). In his complaint Smith alleged that he held an assignment

from petitioner Helen V. Z. Anthony of the cause of action alleged in the complaint (S 230). Miss Anthony was quite evidently repudiating her release, although Smith's allegation of conversion, constituting part, but not all, of his "cause of action" alleged to have been acquired by assignment, was laid as of a time subsequent to the release.

How many more persons might turn up claiming to be assignees of causes of action relating to the trust estate respondent could not know. It accordingly promptly brought a proceeding in the Surrogate's Court, the tribunal in which the accounts of testamentary trustees are normally heard and settled, praying that the validity of its release be determined, and, as to the period falling without the term covered by the release, for the judicial settlement of its account, or for the whole period if the release itself were not effective (21).

This proceeding came duly on for trial, of which the customary notice of trial was given (S 271). Notices to produce specified documents on the trial were served by both sides (S 271-2). Petitioners had interposed an answer contending that Smith's suit involving one item of the account was a bar to the accounting proceeding (S 71-7), and petitioners urged this defense at the outset of the hearing (S 81-92). It was overruled, the trial proceeded (S 92) and final decree was rendered by the Surrogate's Court, approving and settling the trustee's account and finding the release in all respects valid (S 4-14; *Matter of James*, 173 Misc. 1042). On appeal this decree was affirmed by the Appellate Division (262 App. Div. 703) and by the Court of Appeals (287 N. Y. 328). A motion for reargument, advancing the constitutional claims now set forth, was made and denied (287 N. Y. 754). The present petitioners made an application to this court for certiorari on the same constitutional grounds, denied by this court (*sub nom. Anthony* v. *United States Trust Co.*, 315 U. S. 822).

It should be noted that as to all matters occurring after the final delivery of the release the Surrogate's Court held that its jurisdiction did not extend, and the decree left

undetermined, so far as that proceeding was concerned, everything occurring after that date (S 14). Petitioner Smith still had his "conversion" action for whatever it might be worth, for among the things thus left undecided, being alleged to have occurred subsequent to the period covered by the accounting decree in the Surrogate's Court, was the alleged "conversion" claimed to have been wrought by the reduction of the interest. The case whereof certiorari was then sought was thus, as is the present case, an ordinary judicial proceeding, wherein all the present petitioners were brought in by service of process or voluntary appearance, where they all joined in an answer, received and served notice of trial and where the case proceeded to trial and judgment.

Of such a judicial determination, how might it be contended that any one had been deprived of the due process of law guaranteed by the United States constitution? No such idea was ever voiced by counsel until the decree of the Surrogate's Court had been rendered and affirmed by the intermediate court and the court of last resort.

Petitioners' alleged constitutional question, now presented on this application, thus has to do with an altogether separate and distinct judicial proceeding; namely, a proceeding some years ago in the Surrogate's Court for the judicial settlement of the account of the present plaintiff in an antecedent period and in an altogether separate capacity, that is as testamentary trustee. That antecedent period ended with the termination of the present plaintiff's title as testamentary trustee. On June 8, 1936, the date at which the present accounting starts, the antecedent accounting in the Surrogate's Court ended, resulting in a decree judicially settling plaintiff's account for that period, that is to June 8, 1936 (*Matter of James*, 173 Misc. 1042). The present action has nothing to do with plaintiff's administration, in another capacity, during the antecedent period covered by the Surrogate's Court proceeding. One began precisely where the other ended. If petitioners had been exposed to a denial of due process of law in the Sur-

rogate's Court proceeding, correction was to be sought in the review of the decree in that proceeding. And in fact the decree has as we have said been subject to the most exhaustive review. Both the state courts and this court have become fairly familiar with the curious "constitutional" question so vociferously and with such iteration presented to one tribunal after another. With slight variance of phraseology, it is these contentions that are now advanced as to the basis for a review in this court of the judgment in the present action.

Were it necessary to discuss again these familiar "constitutional" contentions of petitioners we should be glad to do so. We have argued them at length in all five courts. But the extraordinary thing about the present attempted review is that it is actually founded on the claim that these contentions, argued, reargued, overruled and again and again overruled in another proceeding, may again be advanced to impugn the judgment in an altogether separate and distinct action.

Our present judgment in no way depends on the antecedent decree of the Surrogate's Court. Its validity and correctness would not be in the least affected had that judgment been a complete nullity, or indeed, had it never existed.

In their own pleading in the case at bar, their amended and supplemental answer, petitioners propounded their claim under the constitution, asserting in paragraph Ninth (14-15) that "contrary to the due process provision of the Fourteenth Amendment of the Constitution of the United States *the said Surrogate's Court* proceeded," etc. Even were there any basis for such contention, this would reveal no constitutional question involved in the present case. The judgment whereof certiorari is now sought is in no way founded on the decree of the Surrogate's Court. The accounting involved in this action was one to whose judicial settlement we were entitled wholly irrespective of anything in the Surrogate's Court proceeding. Even had that pro-

ceeding been wholly a nullity and all its process void, we should nevertheless have been entitled to the judicial settlement of our account for the period not covered by the Surrogate's proceeding. Our administration of the property in our present fiduciary capacity was initiated not as the result of the Surrogate's Court proceeding, but by the expiration of the testamentary trust. Even the determination made by the judgment now sought to be reviewed, that defendant Anthony was bound by the terms of the certificate of participation delivered to and accepted by her, which is the adjudication most bitterly attacked, was an adjudication made by the court itself in the present action, not a simple adoption of an adjudication rendered in another action. The court said (26):

> "Just as Surrogate Foley has held her bound and concluded by the other parts of the closing out of the testamentary trust, *I find her bound* and concluded by that provision of the instrument which she accepted as her muniment of title;"

a ruling manifestly correct but whose correctness or incorrectness would in no event present any constitutional question.

So far as we can make out from the confused verbiage of petitioners' forty-page brief, the alleged denial of due process of law consisted of

> (1) Overruling, in another proceeding in another court, defendants' (the present petitioners') contention that because they had interposed an answer denying the power of the court to give the petitioner in that proceeding (the present respondent) the relief prayed, therefore on overruling that preliminary contention the court should not have proceeded to try the case on the merits. This of course confers no right to certiorari. Petitioners were fully heard on that contention and pursued it through two appeals, and made an unsuccessful application for certiorari

here, and had due process of law to the full. Had they been right in their contention, they would have been entitled to relief without invoking the constitution and if in overruling their contention the court had committed error it would have been an error of law presenting no constitutional question. The contention was in any event absurd on its face, and the ruling was made not in the present suit but in a wholly different proceeding, in respect to which this court has already refused certiorari.

(2) So also of the contention that pendency of the petitioners' conversion action was a bar to the maintenance of this action. On this contention defendants have been fully heard in all the courts. The contention presented no constitutional question. That decision was correct, but even if it had been wrong it would have involved no denial of due process.

As a matter of law the decision of the Surrogate's Court, and the similar but independent decision of the Supreme Court in the case at bar were right; *Nat. Fire Ins. Co.* v. *Hughes*, 189 N. Y. 84; the Surrogate's opinion itself, *Matter of James* (173 Misc. (N. Y.) 1042) and the decision in the present case (20-30). As the Surrogate's Court said (S 265-266; reported in *Matter of James*, 173 Misc. (N. Y.) 1042, 1044-5)):

"Apparently the plaintiff assumes that she is entitled as of right to a trial of the action by a jury. It would be a novel but disastrous departure if beneficiaries could bring separate actions at law for damages based upon alleged acts of negligence or other basis of surcharge against a fiduciary. Under the system of concentration of the disposition of all questions involved in the fiduciary's conduct, in an accounting or other appropriate proceeding in the Surrogate's Court or on the equity side of the Supreme Court, all such questions are determined with

> all of the parties before the court in an expeditious manner. The development of the jurisdiction of Chancery over accountings grew out of the dissatisfaction and delay resulting from the common-law action of account where the entire action was broken up into a series of separate trials and after the verdict in each trial the result was certified back to the auditor appointed to examine the account (*Matter of Beare*, 122 Misc. 519; aff'd 214 App. Div. 723). Delay and expense thereby resulted. That system long ago fell into disuse both in England and in this State. It was supplanted by the more effectual and speedy remedy under the concentrated jurisdiction of a court of equity (*Malone* v. *Saints Peter & Paul's Church*, 172 N. Y. 269, 276; *Matter of Raymond* v. *Davis*, 248 id. 67, 72)."

But even had it been wrong, it was a decision rendered on an issue specifically raised, in a proceeding whereof the court had jurisdiction of all the parties and both the present petitioners appeared and participated in the trial. After hearing them the court held that the pendency of Smith's action was no bar to the accounting proceeding. If this had been error it would have been an error of law in deciding the case and not a denial of due process of law. The conception of denial of the due process of law guaranteed by the United States constitution seems never to have entered counsel's mind till after the affirmance.

> "It is firmly established that when parties have been fully heard in the regular course of judicial proceedings an erroneous decision of the State court does not deprive the unsuccessful party of his property without due process of law within the Fourteenth Amendment of the Constitution of the United States."
>
> Bonner *v.* Gorman, 213 U. S. 86, 91.

The record reveals no error; least of all does it reveal lack of due process of law.

III

Costs should be awarded

Although costs are not ordinarily awarded on a denial of certiorari, the statute (Judicial Code, Sec. 237; U. S. Stat. Ann.; "Judicial Code," Sec. 344) provides that where there appears to be no reasonable ground for granting a petition for certiorari it shall be competent for the Supreme Court to adjudge to the respondent reasonable damages for his delay, and single or double costs. We respectfully suggest that this is a strikingly appropriate case for the exercise of this salutary power. Unfounded as the previous application was, the present application is even more indefensible and injustice is done if its result is to impose on a fiduciary the expense and delay of such a manifestly unjustifiable application, the culmination of four years of an utterly futile and vexatious attempt to capitalize a nuisance value. An allowance of $250 would be within the spirit and letter of the statute, and we respectfully ask the court to consider whether its allowance is not one suggested by the plainest considerations of justice. ~~This court has granted allowances in cases of petitions of certiorari to review~~ judgments of ~~state courts~~ (*e. g.* in *Union Ry. Co.* v. *Jensen*, 289 U. S. 761, where $500 was allowed).

The petition for certiorari should be denied

All of which is respectfully submitted.

April 25, 1944.

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